Supreme Court, U. S.
FILED
MAY 7 1980
MICHAEL RODAK, JR., CLERK

No. 79-880

In the Supreme Court of the United States

OCTOBER TERM, 1979

HENRY KISSINGER, ET AL., PETITIONERS

v.

MORTON HALPERIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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Washington, D.C. 20530

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Although much of respondents' factual presentation is inaccurate or incomplete, we confine ourselves at this stage to a brief response to several of respondents' legal arguments why the Court should deny review of the court of appeals' decision.

1. Respondents urge that the Court should not review the presidential immunity issue because, "[i]n view of the inevitability of a trial on [the Title III] claim, it would be a waste of the Court's time to consider petitioners' defense to the constitutional violations alleged" (Br. in Opp. 13). As we pointed out in the petition, however, petitioners have not sought review of the court of appeals' statutory ruling only because of their view that, "even under the analysis of the court of appeals, no liability can be established under Title III" (Pet. 11 n.8). Moreover, if, as

we submit, the President (and his closest advisers) are entitled to immunity from damages liability for decisions made in the exercise of the President's official responsibilities under Article II of the Constitution, that immunity could serve as a defense to statutory as well as constitutional causes of action.

2. Respondents contend that this is not an appropriate case for review of the presidential immunity question for a melange of reasons, among them because (i) President Nixon was personally involved in the surveillance decision, (ii) President Nixon resigned from office, and (iii) this case does not involve "an official and otherwise lawful act" (Br. in Opp. 14-15). We frankly do not understand the first two objections. Indeed, the fact that President Nixon was forced to leave office because of public and congressional disapproval of his actions strongly supports our contention (see Pet. 19) that the threat of damage suits is not essential in order to deter intentional presidential misconduct. Finally, respondents are wrong in viewing the term "official" as a synonym for "otherwise lawful." Clearly, it is within the President's "official" duties to authorize investigations to discover the source of damaging leaks of military and foreign policy information, even if in a particular instance the investigation is carried out in an improper manner.

3. Respondents contend (Br. in Opp. 16-19) that petitioners' absolute immunity claims are foreclosed by *Butz* v. *Economou*, 438 U.S. 478 (1978). The court of appeals agreed, holding that *Economou* removes "absolute immunity * * * for acts not involving adjudication or prosecution" (Pet. App. 36a). This Court's opinion in *Economou*, however, did not adopt such a litmus paper

approach. The Court remarked that, although a qualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations, there remain "some officials whose special functions require a full exemption from liability." 438 U.S. at 508. The law accords an absolute immunity when it is required by "public policy" and is "essential for the conduct of the public business." *Id.* at 506, 507.

This case offers the Court the opportunity to consider whether the President of the United States and his closest advisors[1] fall within the narrow category of Executive Branch officials recognized in *Economou* whose "special functions" require an absolute immunity from private damage suits. Nothing in respondents' submission diminishes either the exceptional importance of this legal issue or the need for this Court's review.[2] If the President

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[1]Here, petitioner Mitchell has been sued for his actions as Attorney General in advising the President on matters of law (see 28 U.S.C. 511), petitioner Kissinger has been sued for his actions as National Security Advisor in counseling the President on the security impact of leaks of sensitive information (cf. *Snepp* v. *United States*, Nos. 78-1871 and 79-265 (Feb. 19, 1980), slip op. 3 n.3), and petitioner Haldeman has been sued for his actions as Assistant to the President in serving as the White House manager and recipient of FBI reports on the ongoing investigation into leaks of classified information.

[2]Respondents' attempts to minimize the importance of the court of appeals' decision are insubstantial. As we noted in the petition (Pet. 11), before the lower court decisions in this case, no court had ever ruled that the President may be held personally liable in money damages for official acts that he takes during his conduct of office. The District of Columbia Circuit's rejection of absolute presidential immunity is particularly significant because virtually all *Bivens*-type suits against the President may be brought in that jurisdiction. Indeed, in at least one other case now pending, petitioner Nixon has

may be sued for damages based on his acts as President, this Court, and not the court of appeals, should make that judgment.

For these reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

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been sued for damages by a former government employee for his refusal as President to order the rehiring of the employee. See *Fitzgerald* v. *Butterfield*, Civ. No. 74-178 (D. D.C. Mar. 26, 1980), appeal dismissed, No. 80-1407 (D.C. Cir. April 30, 1980), pending on petition for certiorari, No. 79-1738. Moreover, another damages action against the former President is now before the Second Circuit. *Clark* v. *United States*, 481 F. Supp. 1086 (S.D. N.Y. 1979), pending on appeal, No. 80-6016 (2d Cir.).

DOJ-1980-05